



July 10, 2001

Ms. Mary E. Reveles
Assistant County Attorney
County of Fort Bend
301 Jackson, Suite 621
Richmond, Texas 77469-3108

OR2001-2962

Dear Ms. Reveles:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149223.

The Fort Bend County District Attorney's Office (the "district attorney") received a request for all files, records, and any other documents in the possession of the district attorney pertaining to a certain person and two specified state district court cause numbers. You claim that the information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the requestor. *See* Gov't Code § 552.304.

You claim exceptions from required public disclosure for Exhibits D through K, which you submitted to this office as a "representative sample" of the information at issue. Pursuant to section 552.301(e), a governmental body is required to submit to this office no later than fifteen business days after receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(D), (e)(2). In your brief, you describe the responsive information as voluminous and extensive, and note that it contains "voir dire questions, witness statements, subpoenas, motions, argument ideas, DNA report, autopsy report, and jury instructions, to name a few." You also state that "all of the records contained in the district attorney's internal file are similar to Exhibits G through J." However, with the possible exception of "argument ideas," the submitted documents, which you state comprise a representative sample of the information at issue, contain none of the types of documents listed in your brief. In order to determine whether information is subject to a particular exception, this office must review the information. Open Records Decision Nos. 499 at 5 (1988), 497 at 3 (1988) (governmental body requesting decision must include copies of all documents or information if they contain substantially different types of

information). Accordingly, the sample you have submitted is not truly representative of all the information for which you claim exceptions. Thus, to the extent the submitted documents are not truly representative of the information at issue, you have failed to comply with section 552.301(e).¹

The requested information is presumed to be public information when a governmental body does not comply with section 552.301. Gov't Code § 552.302. In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). Generally, a compelling reason under section 552.302 is demonstrated only where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). You have not raised any specific compelling reasons to overcome the presumption that the information is public. Sections 552.103 and 552.108 are discretionary exceptions under the Public Information Act.² Thus, pursuant to section 552.302, all responsive information which is not represented by the submitted sample must be released to the requestor. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352. Because the information was not submitted, however, we have no basis for concluding that any of it is confidential. If you believe that the information is confidential and cannot lawfully be released, you must challenge this ruling in the manner provided below. We next address the information submitted for our review.

You state that the documents in Exhibits B through F, and K are available to the public in the official district clerk's record. Section 552.022(a)(17) of the Government Code provides that information that is also contained in a public court record is not excepted from required disclosure unless "confidential under other law." As noted above, section 552.103 and 552.108 are discretionary exceptions under the Public Information Act, and do not constitute "other law" that makes information expressly confidential. Accordingly, the district attorney must release all responsive information that also is contained in public court records pursuant to section 552.022(a)(17) of the Government Code. We next address the information in the remaining submitted samples.

¹In apparent reference to section 552.303 of the Government Code, you indicate that the district attorney would provide any additional information upon request from this office. We note that section 552.303(c) provides that if the attorney general determines that information "in addition to that required by Section 552.301 is necessary to render a decision, the attorney general shall give written notice of that fact to the governmental body and the requestor." Gov't Code § 552.303(c) (emphasis added).

²Discretionary exceptions are intended to protect the interest of the governmental body, as opposed to exceptions which are intended to protect information deemed confidential by law or the interest of third parties. *See* Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 177 (1977) (statutory predecessor to section 552.108 is discretionary exception).

Section 552.108 states, in relevant part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

In connection with your section 552.108(b)(3) claim, you state that the information represented by Exhibits G through J was prepared by an attorney representing the state in anticipation of criminal prosecution. You also assert that the information relates to a pending criminal appeal, and you submitted to this office copies of applications for that appeal. Based upon your representation and our review of your supporting documents, we conclude that the information constitutes an internal record of a prosecutor representing the state that is maintained for internal use in matters relating to prosecution which reflects the legal reasoning of that prosecutor. Accordingly, you may withhold the remaining information represented by Exhibits G through J pursuant to section 552.108(b)(3)(B) of the Government Code. Although section 552.108(b)(3)(B) authorizes you to withhold from disclosure the information represented by Exhibits G through J, you may choose to release all or part of the information at issue that is not otherwise confidential by law. *See* Gov't Code § 552.007.

In summary, the information in Exhibits B through F, and K must be released to the requestor pursuant to section 552.022(a)(17). The information contained in Exhibits G through J, and all information of which these exhibits are truly representative, may be withheld under section 552.108(b)(3)(B). The remaining responsive information must be released to the requestor pursuant to section 552.302.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

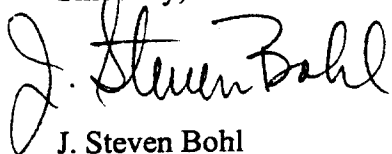
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Steven Bohl". The signature is fluid and cursive, with the first name "J." and last name "Bohl" clearly distinguishable.

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 149223

Enc: Submitted documents

c: Mr. George McCall Secrest, Jr.
Bennett & Secrest, L.L.P.
808 Travis Street, 24th Floor
Houston, Texas 77002
(w/o enclosures)